No. 92-1639

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

COLGATE-PALMOLIVE, CO.,
Petitioner,

vs.

FRANCHISE TAX BOARD,
An Agency of the State of California,
Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California for the Third Appellate District

BRIEF OF AMICI CURIAE LITTON INDUSTRIES, INC. AND THE TIMES MIRROR COMPANY IN SUPPORT OF RESPONDENT

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No. 92-1839

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

COLGATE-PALMOLIVE, CO.,

Petitioner,

vs.

FRANCHISE TAX BOARD,
An Agency of the State of California,

Respondent.

INTEREST OF AMICUS CURIAE

Amici curiae Litton Industries, Inc. ("Litton") and The Times Mirror Company ("Times Mirror") are domestic (United States parented) multinational corporations involved in a variety of industries ("Amici"). Amici compete in a global marketplace against foreign and domestic-based corporate groups.

Litton is a technology company providing resource exploration services, industrial automation systems and advanced electronic and defense systems for North American

and world markets. Times Mirror is a California-based media and information company. Its publishing business is operated throughout the United States, Europe and the Far East.

The issue in this case is the constitutionality of *compulsory* worldwide combined reporting ("WWCR") for domestic-based corporations. This issue was decided in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983) ("*Container*"). California changed its law in 1986 to permit all corporations to elect to file on either a WWCR or water's edge basis. Amici currently elect to have their California tax liability computed under WWCR because, like some other domestic-based corporations, they have concluded that it is competitively advantageous to continue to do so. The financial burdens or benefits of WWCR are not a function of whether a corporation is domestic or foreign based but depend upon the business structure and operations of each individual company. Amici, therefore, have a strong interest in this Court restricting its ruling to the legality of compulsory WWCR, and not declaring illegal elective WWCR.

If this Court overrules *Container*, Amici urge that such a decision be rendered on a purely prospective basis. To do otherwise could unfairly expose Amici to potential retroactive tax increases as well as cause severe economic harm to the State of California. It would also give an unfair competitive

advantage to corporations which ignored *Container* over otherwise similarly situated corporations which relied on *Container*.

SUMMARY OF ARGUMENT

Container held that compulsory WWCR for domestic-based corporations is constitutional. This case presents the identical legal issue. Nothing has transpired in the decade since *Container* was decided to warrant overruling it. California has modified its taxing scheme. It no longer requires WWCR which renders the legal issue in this case moot.

Even if this Court were to hold in *Barclays Bank PLC v. Franchise Tax Board*, (No. 92-212 (U.S. Supreme Ct. Oct. 5, 1992) ("*Barclays*") that California's former statutory scheme imposing compulsory WWCR on foreign-based corporations was unconstitutional, that would not justify overruling *Container*. Different treatment of domestic-based corporations is constitutional because of significant differences between foreign and domestic-based corporations, the failure of the federal government to issue a clear directive prohibiting compulsory WWCR for domestic-based corporations, and the greater latitude given to states to tax such corporations.

The financial impact of WWCR on corporations depends upon the structure of their business operations, not their geographical domicile. Accordingly, many domestic-based corporations continue to file on a WWCR basis. Thus, WWCR does not prefer one form of protected commerce over another. Moreover, even if a particular corporation is adversely affected by WWCR, no legal authority supports the proposition that such individual "competitive imbalance" violates either the Foreign Commerce or Equal Protection Clause.

If this Court were to overrule *Container* that decision should be purely prospective. All criteria for prospective application are satisfied since the Court would be overruling a recent decision upon which taxpayers and taxing agencies relied in good faith and retroactive application would produce unfair and inequitable results.

ARGUMENT

A. The Sole Issue In This Case Is The Constitutionality Of Compulsory Worldwide Combined Reporting For Domestic Corporations.

The issue in this case is the constitutionality of compulsory WWCR. The validity of California's current law to allow taxpayers to elect WWCR or water's edge reporting is not

before the Court in this case. CAL. REV. & Tax. Code § 25110. Nor, as some amici seem to suggest in this case and in *Barclays*, is the constitutionality of the basic unitary system at issue. That system has been repeatedly upheld. *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*, 266 U.S. 271 (1924); *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *Container*, 463 U.S. at 165. This Court recently reaffirmed that

> we permit States to tax a corporation on an apportionable share of the multistate business carried on in part in the taxing State. That is the unitary business principle.

Allied-Signal, Inc. v. Director, Taxation Division, 504 U.S. ____, 119 L.Ed.2d 533, 546 (1992) ("*Allied-Signal*").

Amici currently voluntarily file their California tax returns on a WWCR basis because it is financially advantageous to do so. If this Court were to declare elective WWCR unconstitutional and make its ruling retroactive, Amici will be exposed to unexpected and substantial tax increases for all open tax years. For the above reasons, Amici urge that the ruling in this case be limited to the constitutionality of compulsory

WWCR and that it not address the legality of the current California statutory scheme.

In any event, California's current elective system is perfectly proper. Consistent with the Constitution the states have wide latitude in assessing state income taxes. States are not restricted to a "single formula" for determining state tax liability. *Container*, 463 U.S. at 167, 169.

> To be sure, our cases give States wide latitude to fashion formulae designed to approximate the instate portion of value produced by a corporation's truly multistate activity.

Allied-Signal, 119 L.Ed.2d at 550. Thus, even if compulsory worldwide reporting were held to violate the Constitution for foreign and/or domestic-based taxpayers, states are not prohibited from enacting other formulae including California's current elective worldwide or water's edge reporting system.

B. <u>If This Court Rules In *Barclays* That Compulsory WWCR For Foreign-Based Companies Violates The Constitution, It Does Not Have To Invalidate WWCR For Domestic-Based Taxpayers Or Even Rule At All In This Case</u>.

1. California Has Changed Its Law To Eliminate Compulsory WWCR Rendering The Legal Issue Moot.

The statutory scheme complained of by petitioner has changed substantially since the tax years in question. Compulsory WWCR no longer exists in California. California has modified its tax system to permit foreign-based and domestic-based companies to elect to compute their California tax liability based on a "water's edge" method which generally limits the unitary formula to affiliated entities incorporated within the United States and its possessions. CAL. REV. and Tax. Code § 25110. Corporations electing the water's edge basis originally were required to pay an "election fee" and to file a "domestic disclosure spreadsheet" providing the Franchise Tax Board with information concerning the taxpayer's multistate tax computations. (CAL. REV. and Tax. Code §§ 25114-15.) California amended its tax system in 1993 to eliminate the

election fee and domestic spreadsheet requirements. (STATS. 1993, ch. 881.) Thus, petitioner is urging this Court to overrule *Container* so as to declare unconstitutional a statutory scheme that no longer exists.

2. The Same Foreign Commerce Clause Issues Raised By Petitioner Were Decided In *Container*; Nothing Has Changed In The Intervening Short Time Period To Warrant Overruling *Container*.

Petitioner claims that compulsory WWCR as applied to domestic-based corporate groups violates the Foreign Commerce Clause because it prevents the federal government from "speaking with one voice." This exact argument was rejected in *Container*.

> . . . the foreign policy of the United States -- whose nuances, we must emphasize again, are much more the province of the Executive Branch and Congress than of this Court -- is not seriously threatened

> by California's decision to apply the unitary business concept and formula apportionment in calculating appellant's taxable income.

Container, 463 U.S. at 196.

Nothing has occurred since *Container* was decided that warrants its modification. Unlike the situation in *Barclays*, neither the Executive Branch nor any foreign government has involved itself in *Colgate* on petitioner's behalf. No congressional action suggests that Congress intends that California be barred from applying compulsory WWCR to domestic-based companies.

Petitioner's argument rests on the flimsiest "evidence." It cites only the "missing evidence of the Executive Branch's opposition to worldwide combined reporting" (Pet. Br. at p. 34) and claims as "a clear federal directive," private letters between petitioner's chairman and a former Cabinet official, and other private correspondence. This does not demonstrate clear federal policy against WWCR as is required under the dormant Foreign Commerce Clause analysis to invalidate a state tax. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979)

("*Japan Line*"). Thus, it does not constitute justification for overruling *Container*.

3. Except In Extraordinary Circumstances, This Court Should Not Overrule A Prior Decision.

The doctrine of *stare decisis* and other jurisprudential considerations require exceptional circumstances to overrule prior decisions, particularly a recent one like *Container*. No such circumstances have been cited by petitioner. Rather, the lack of federal governmental action affecting the dormant Foreign Commerce Clause analysis, and significant alteration of the challenged statutory scheme rendering the legal issue moot, mandate affirmance or dismissal.

Recent decisions affirm that the doctrine of *stare decisis* is strictly followed in taxpayer cases, particularly those involving justifiable reliance by the states or taxpayers. Such reliance was a crucial factor in this Court's refusal to "abandon our settled jurisprudence defining the limits of state power to tax under the unitary business principle." *Allied-Signal*, 119 L.Ed.2d at 551. Similarly, this Court, recognizing the settled expectations of taxpayers and taxing agencies, declined an invitation to overrule an earlier decision governing state sales and use taxes on

interstate commerce. *Quill Corp. v. North Dakota*, 504 U.S. ____, 119 L.Ed.2d 91 (1992) ("*Quill Corp.*"). The Court noted:

> The 'interest in stability and orderly development of the law' that undergirds the doctrine of *stare decisis* therefore counsels adherence to settled precedent.

Id., at 110 (citations omitted); see *Runyon v. McCrary*, 427 U.S. 160, 190-191 (1976) (Stevens, J., concurring).

Just last term this Court relied on *Container* in deciding *Itel Containers International. Corp. v. Huddleston*, 507 U.S. ____, 122 L.Ed.2d 421 (1993) ("*Itel*"). In *Itel*, this Court upheld a Tennessee sales tax on leases of cargo containers used in foreign commerce. In discussing whether that taxation scheme more resembled that in *Japan Line*, or in *Container*, this Court gave no indication that the continued viability of *Container* was in question. *Itel*, 122 L.Ed.2d 421, 434-437. To abruptly abandon *Container*, particularly in light of this record, would defeat the policies of protection of reliance interests and stability and orderly development of the law underlying the doctrine of *stare decisis*.

4. The Decisions In *Barclays* And *Colgate* Need Not Be The Same.

The factual, legal and policy implications in *Barclays* differ substantially from those in the instant case. As noted above, neither the federal nor a single foreign government has asserted itself in this case, a marked contrast with *Barclays*.

The federal government is a party to a number of tax treaties which require the use of the arm's length/separate accounting method in allocating the United States income of foreign-based multinational enterprises. However, that requirement is "generally waived with respect to the taxes imposed by each of the contracting nations on its own domestic corporations." *Container*, 463 U.S. at 196. As an example, the federal government's income tax treaty with the United Kingdom, a nation active in the campaign to proscribe the application of compulsory WWCR to foreign-based companies, states:

> (3) Notwithstanding any provision of this Convention . . . a Contracting State may tax its residents . . . and its nationals as if this Convention had not come into effect.

Income Tax Convention with the United Kingdom of Great Britain and Northern Ireland, Dec. 31, 1975, Article 1, Section (3). (Jt. Stip., Exhibit 46gg.)

In addition, there are significant differences between foreign and domestic-controlled corporate groups as regards state taxation. As recognized by the federal government, domestic-based groups have primary and substantial contacts with the states and are organized and conditioned to respond to reporting requirements, while foreign-based groups with minimal contacts in the United States may encounter burdensome reporting requirements. Jt. Stip. Exhibit 43d at pp. 7-9.

These significant differences were conceded by amici for the petitioners in *Barclays*:

> Difference of both principle and practicality explain why the foreign reaction is so much stronger when California applies its tax to a foreign-based company. First, it is a fundamental precept of international law, and an underlying theme of *Container*, that a nation

> may tax its own domiciliaries as it chooses. The balance of interests shifts when one nation seeks to tax the domiciliary of another in a manner at odds with international norms. Second, the record here demonstrates that the compliance burdens for foreign companies far exceed those for domestic companies, thereby adding a discriminatory gloss to an already aberrant system.

Brief of Amici Curiae National Foreign Trade Council, Inc. et al. in Support of Petition for Certiorari - *Barclays Bank PLC v. Franchise Tax Board* at p. 3.

Ironically, these same amici make the opposite argument in the instant case. Brief of Amici Curiae Chamber of Commerce of the United States, et al. in Support of Petitioner Colgate Palmolive at p. 17; Brief of Amici Curiae National Foreign Trade Council, et al. in Support of Petitioner Colgate Palmolive at pp. 28-29.

Neither legal nor policy considerations require this Court to adopt the same rule in *Colgate* as in *Barclays*.

5. There Is No Support In The Constitution For Petitioner's "Competitive Balance" Argument.

Petitioner argues that if this Court decides in favor of Barclays, it must also rule for Colgate because the Foreign Commerce Clause compels "competitive balance" for domestic corporations as an integral part of federal foreign policy.

Petitioner offers no authority that "competitive balance" is an element in Foreign Commerce Clause analysis. None exists.

Nor does petitioner's "competitive balance" argument find any support in equal protection jurisprudence. No case holds that the Equal Protection Clause is violated by compulsory WWCR for domestic-based taxpayers.

The Constitution does not forbid laws which differentiate between classes of persons, but merely prevents governmental decision makers from "treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. ____, 120 L.Ed.2d 1, 12 (1992) ("*Nordlinger*") (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Unless a classification implicates the exercise of a fundamental right or involves an inherently suspect classification, the Equal Protection Clause

requires only that it rationally further a legitimate state interest. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-441 (1985); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). States have especially broad latitude in creating classifications and distinctions in tax statutes. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) ("*Lehnhausen*"); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547 (1983).

Petitioner's argument erroneously implies that WWCR is disadvantageous to all taxpayers and that it is possible to predict the financial impact of WWCR depending upon where a taxpayer is domiciled. Thus, it erroneously argues that allowing foreign-based corporations to file on a water's edge basis while requiring WWCR for domestic corporations discriminates against the latter by necessarily making them less competitive. (Pet. Br. p. 42-45.)

However, whether a taxpayer is advantaged or disadvantaged by WWCR is a function of a number of factors unrelated to whether it is foreign or domestic based. For example, a domestic-based company that has foreign operations which generate tax losses which offset domestic taxable income will have lower California taxes under WWCR than under water's edge reporting. Amici, domestic-based corporations engaged in worldwide commerce, continue to file voluntarily on a WWCR basis because it is beneficial to do so given the

specifics of their business operations. Similarly, under California's current elective system, some foreign-based corporations continue to file voluntarily on a WWCR basis, presumably because it is advantageous to do so.

Thus, there is no necessary correlation between one's status as a foreign or domestic-based corporation and any tax advantage or disadvantage due to WWCR. Rather, any higher California taxes are a result of the structure of a corporation's individual business operations. The Commerce Clause is not violated when the differential tax treatment of two categories of companies relates solely to differences in the nature of their businesses and does not stem from the location of their activities. *Amerada Hess Corporation v. New Jersey Department of the Treasury*, 490 U.S. 66, 78 (1989).

While petitioner apparently will benefit by filing a water's edge return, that does not violate equal protection guarantees. There is no "burdened class" in which all members are harmed by the taxing statute and, as noted herein, a rational basis exists for treating differently foreign and domestic-based corporations. *Nordlinger*, 112 L.Ed.2d 1 [ad valorem taxation based on date of acquisition of property]; *Lehnhausen*, 410 U.S. 356 [ad valorem tax on personal property of corporations and other non-individuals only]; *Allied Stores of Ohio v. Bowers*, 358 U.S. 522

(1959) [ad valorem tax on merchandise and agricultural products stored in warehouses by non-residents]).

6. A Different Rule Concerning WWCR For Domestic And Foreign-Based Companies Does Not Unconstitutionally Favor One Form Of Protected Commerce Over Another.

Petitioner erroneously asserts that a decision in favor of *Barclays* and against *Colgate* would favor the foreign commerce of a foreign corporation over that of a domestic corporation in violation of the Foreign Commerce Clause. (Pet. Br., pp. 45-47.) First, as noted above, neither foreign nor domestic-based corporations would be preferred because there is no correlation between domicile and any benefit or burden of WWCR.

Second, petitioner's reliance on *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) ("*Boston Stock Exchange*"), is misplaced. That case did not involve the Foreign Commerce Clause. It held that a New York statute whose express purpose was to promote New York stock exchanges and that facially discriminated against nonresidents and out-of-state stock exchanges violated the Interstate Commerce Clause.

Petitioner's strained reading of *Boston Stock Exchange* to mean that no state statute can ever favor one form of protected commerce over another cannot be sustained in light of the later rulings in *Japan Line* and *Container*. Both opinions recognize that state taxation schemes constitutionally can favor one form of commerce over another. *Japan Line* held unconstitutional a California property tax on foreign-owned and based cargo containers used in foreign commerce. Yet, *Japan Line* expressly stated that the California property tax was constitutional as applied to interstate commerce, another form of "protected commerce." *Japan Line*, 441 U.S. at 445. Moreover, *Japan Line* did not invalidate the California property tax as it applied to cargo containers used in foreign commerce by domestic corporations. That result negates petitioner's *Boston Stock Exchange* argument.

In upholding WWCR for domestic corporations in *Container* this Court also recognized that under the dormant Foreign Commerce Clause there are distinctions between foreign and domestic corporations engaged in foreign commerce that affect the constitutionality of state taxation laws. *Container*, 463 U.S. at 194-97. Thus, petitioner's *Boston Stock Exchange* argument really is that *Container* and *Japan Line* were wrongly decided.

Finally, the summary affirmance without opinion of *Zee Toys, Inc. v. County of Los Angeles*, 85 Cal. App.3d 763, 149 Cal Rptr. 750 (2d Dist. 1978) *aff'd sub nom. Sears, Roebuck & Co. v. County of Los Angeles*, 449 U.S. 1119 (1981) also cannot support petitioner's expansive reading of *Boston Stock Exchange* (Pet. Br. at p. 47). This Court's action in *Zee Toys* predated *Container*, yet neither *Zee Toys* nor *Boston Stock Exchange* were cited by the majority nor the dissent in *Container* for the proposition suggested by petitioner.

Adopting petitioner's view of *Boston Stock Exchange* would require this Court to reject its prior analysis in *Japan Line* and *Container* and is not supportable on legal or policy grounds.

C. If This Court Overrules *Container*, The Decision Should Be Purely Prospective.

1. This Case Satisfies The Criteria For Purely Prospective Application.

This Court has often rendered its decisions on a "purely prospective" basis. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) ("*Chevron Oil*"); *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 88 (1982); *Buckley v. Valeo*,

424 U.S. 1, 142-143 (1976): *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422 (1964).

> [T]he propriety of prospective application of decisions in this Court, in both constitutional and statutory cases, is settled by our prior decisions.

James B. Beam Distilling Company v. Georgia, 501 U.S. _____, 115 L.Ed.2d 481 (1991) (White, J., concurring) ("*James Beam*"). Further,

> the paradigm case [for nonretroactivity] aris[es] when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct.

James Beam, 115 L.Ed.2d at 487.

While this Court recently disapproved "selective prospectivity," holding that a decision "applied to the parties of

the controversy, must be given full retroactive effect . . . ," it acknowledged the continued viability of the doctrine of pure prospectivity. *Harper v. Virginia Department of Taxation*, 509 U.S. _____ , 125 L.Ed.2d 74, 86 (1993) ("*Harper*"); *James Beam*, 115 L.Ed.2d 481. Justice Thomas noted that the Court may "reserve the question whether its holding should be applied to the parties before it" thereby affirming the option of applying the decision only in the future. *Harper*, 125 L.Ed.2d at 86-87 (quoting *James Beam*).

Moreover, the traditional test set forth in *Chevron Oil* for determining whether a decision should be applied retroactively, which obviously no longer applies to the now abandoned doctrine of selective retroactivity, still governs as to when an opinion may be applied purely prospectively. *Harper*, 125 L.Ed.2d at 87, 95-96 (Kennedy, J., concurring); *James Beam*, 115 L.Ed.2d at 493.

The first requirement of the *Chevron Oil* test is that

> the decision to be applied nonretroactively must establish a new principle of law, either *by overruling clear past precedent* on which litigants may have relied,or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Chevron Oil, 404 U.S. at 106 (citations omitted; emphasis added). Clearly, that criteria would be satisfied if *Container*, decided a mere 10 years ago, were unexpectedly overruled.

Second, the case must be evaluated "looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation." *Id.*, at 107. This aspect of the test is also satisfied. Here the statutory scheme has already been amended twice to eliminate compulsory WWCR. The legal issue is moot. If *Container* is overruled, certain taxpayers such as petitioner who have filed claims may receive income tax refunds, and other taxpayers such as Amici whose tax returns remain "open" for certain years for reasons having nothing to do with WWCR, may be assessed additional taxes. However, no public policy supporting a court ruling prohibiting compulsory WWCR will be harmed by having the decision apply on a purely prospective basis.

The third prong of the *Chevron Oil* test is particularly critical and relevant in this case. The Court must weigh any inequities caused by retroactive application. *Id.*, at 107. Thus, the public policy and jurisprudential factor of good faith

reliance that also underlies the doctrine of *stare decisis* compels that any decision overruling *Container* be applied on a purely prospective basis. In refusing to overturn prior case law governing unitary tax principles, this Court noted that

> State legislatures have relied upon our precedents by enacting tax codes which allocate intangible nonbusiness income to the domiciliary State. . . . And, of course, we would defeat the reliance interest of those corporations which have structured their activities and paid their taxes based upon the well-established rules we here confirm.

Allied-Signal, 119 L.Ed.2d at 551 (citations omitted).

Like the situation in *Allied-Signal* and the "*Bellas Hess* rule" that was not overturned in *Quill Corp.*, *Container* "has engendered substantial reliance. . . ." Moreover, that reliance is clearly justified.

> [R]eliance upon a square, unabandoned holding of the

> Supreme Court is *always* justifiable reliance (though reliance alone may not always carry the day).

Quill Corp., 119 L.Ed.2d at 112 (Scalia, J., concurring).

Relying upon *Container*, California collected, and most corporations paid without challenge, taxes in accordance with compulsory WWCR for the years it was in effect. However, if a decision overruling *Container* were applied retroactively, the state could be required to pay refunds in the approximate amount of $1.2 billion to those domestic corporations that filed claims for refund challenging compulsory WWCR (Pet. Br. at 38). Similarly, Amici and others similarly situated who have filed tax returns in accordance with WWCR but have "open tax years" possibly could be assessed substantial additional taxes in excess of several hundred million dollars if their tax returns were invalidated and taxes assessed on a different method.

Retroactive application would cause severe economic hardship to the state. Significant financial hardship on governmental bodies has been held to be a basis for not applying a decision retroactively. *Cipriano v. Houma*, 395 U.S. 701, 706 (1969). "[W]e ought not to visit economic hardship upon those who took us at our word." *Quill Corp.*, 119 L.Ed.2d at 112 (Scalia, J., concurring).

The objective of placing similarly situated taxpayers on "a level playing field" by eliminating the effects of past discrimination also would not be furthered by retroactivity. See *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 48-50 (1990) ("*McKesson*"). The situation here contrasts markedly with those in which out-of-state companies had greater tax burdens imposed on them by statutes facially discriminating in favor of in-state companies. Where, for example, tax preferences were provided for local distributors of liquor, *McKesson*, and for locally registered commercial vehicles, *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987) retroactive application forced the state to tax both in and out-of-state companies on the same basis to rectify financial hardship caused by unequal treatment. That is not a consideration in this case where the statute prescribed the same method of taxation for both foreign and domestic-based corporations.

Further, acting in reliance on *Container*, many taxpayers who would have preferred to file on a water's edge basis, did not file claims with the Franchise Tax Board, a prerequisite under California law to receiving a refund. CAL. REV. & Tax. Code §§ 25664, 25665, 26102. Retroactive application of a decision overruling *Container* will give those taxpayers who did file claims a competitive windfall by allowing them to receive refunds. At the same time it would penalize identically situated

taxpayers who respected *Container* and did not file refund claims.

2. Retroactive Application Would Harm California's System Governing Administrative Appeals By Taxpayers.

California requires all issues to be raised in a taxpayer's administrative claim for refund or be waived if a suit for refund is commenced. CAL. REV. & Tax. Code § 26102; *Title Insurance Co. of Minnesota v. State Board of Equalization*, 4 Cal.4th 715 (1992). If this Court overrules a recently decided case like *Container*, particularly on this record, it will adversely affect the administrative tax refund claims and appeals process in California. Taxpayers and practitioners will be under severe pressure to contest every imaginable issue, even when there is an opinion of this Court squarely on point. If they fail to do so, and this Court unexpectedly overrules a recent decision and applies the new rule retroactively, they may be exposed to charges of negligence from shareholders or clients. Challenges raising every conceivable issue whether well-settled or not, could bring the state tax appeals system to a standstill.

CONCLUSION

The decision of the California Court of Appeal should be affirmed.

Respectfully submitted,

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